IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
v.	)	ID#: 0003016874
MILTON TAYLOR, Defendant.	)	

Submitted: March 16, 2010
Decided: August 6, 2010

MEMORANDUM OPINION AND ORDER

Upon Defendant's Motion for Postconviction Relief – *DENIED*

SILVERMAN, J.

Milton Taylor, a habitual offender who was on probation, admitted that while "high as a mother" on drugs and alcohol, he beat and strangled his pregnant girlfriend, then mutilated her body. Preferring death over life in prison, Taylor adamantly opposed his lawyers' presenting a mitigation case at his capital murder trial's penalty phase. Nevertheless, his lawyers employed a psychiatrist, a psychologist, a pastoral counselor, two or three psycho-forensic evaluators, and at least one gumshoe to look for mitigating evidence. They examined Taylor and his background, interviewing his mother and stepfather, among others. They assembled Taylor's records from reform school, prison and elsewhere.

As Taylor's penalty hearing began, the court cautioned Taylor, at length, about the potentially "fatal" consequences of foregoing a mitigation case, and it gave him the night to reconsider. Taylor decided to let trial counsel present some, but only some, of the mitigators they developed. The court again warned Taylor that he was hamstringing his lawyers. Among other things, the court told Taylor:

> If you tell your lawyers not to present the full picture, which is what you are doing . . . your ability will be seriously undermined, to come back later in a post-conviction relief proceeding[,] like I just explained to you[,] and complain that your lawyers were not effective for you at this penalty hearing[.] . . .
>
> So in other words, if you tie one or both of your lawyers' hands behind their backs when they are trying to make this presentation to the jury you can't come back later and then complain that they acted that way, if their hands were tied

behind their backs[.][1]

Taylor would not relent, so his lawyers presented the limited mitigation case. Thus, the jury and sentencing court did not hear Taylor's claims that decades before the murder, during childhood, he had repeatedly been hit on the head and his parents abused him terribly. But, the jury and the court also did not hear that Taylor's parents "flatly" deny his claims of abuse, and that the stories of abuse and head injuries came almost entirely from Taylor. The jury and court also did not hear that Taylor is a violent sadist who tortured animals, set a schoolgirl's hair on fire, and regularly beat up people to relieve tension. Taylor's trial counsel kept those facts from the jury and from the sentencing court.

Now, Taylor has new lawyers. Primarily, they argue that Taylor's opposing a full mitigation case is legally unimportant, and Taylor's trial lawyers were ineffective for not handling the records better and not insisting on more testing. Taylor offers new mitigators, such as evidence that he suffers from "mild" brain damage attributable to the alleged childhood head traumas. And, some criminals like Taylor "mellow" with age. Taylor now contends that had the full picture been revealed, presumably including the new non-statutory aggravators – sadism, animal cruelty, bullying and fire setting – as well as the new alleged mitigators – mild brain damage, head trauma and aging – Taylor would not be under a death sentence.

[1]Trial Tr. 36:2-16 (Apr. 4, 2001).

I.

A. Theresa Williams's Murder and Taylor's Confession

The facts leading to Taylor's conviction are set out in the Supreme Court of Delaware's opinion.[2] In summary, on March 23, 2000, Theresa Williams's body was found in her home, under a blanket, with a bicycle on top. Williams was pronounced dead at the scene. Autopsy revealed that she had been beaten, strangled with a ligature, and cut. Although the cuts, to her stomach and throat, were relatively minor, they were inflicted after death. Also, Williams was four months pregnant when she died.

Taylor became a suspect after police discovered he was in a relationship with Williams and had been seen near her home on the morning she was murdered. Taylor was arrested on an outstanding bench warrant on March 25, 2000. A handwritten confession was found on Taylor, stating:

> My name is Milton E. Taylor, I was born on 11-15-68, my Social Security number is [XXX-XX-XXXX]. I am wanted by the Wilmington police for the murder of Theresa Irene Williams a.k.a. Treety.
>
> I confess that I did kill Treety and left Terrel and her daughter outside because I couldn't hurt either one of them. After I strangled her I stuck a long kitchen knife in her mouth and cut something in her throat.

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[2] *See Taylor v. State*, 822 A.2d 1052 (Del. 2003).

> The kitchen knife is locked in Treety's car trunk wrapped in the shirt I was wearing when I killed her. There should be no sympathy for me, because I killed a pregnant woman who was carrying 'my' child.
> I'm sorry Mr. Tyson for taking your baby from you. She's in Gods' hands now.
>
> . . . .
>
> Anyway, God forgives murderers. So me and Treety will be together again but for eternity this time!

With a warrant, police searched Williams's car where they found a thirteen-inch knife, wrapped in a shirt stained with Williams's blood.

B. "Team Taylor"

Two assistant public defenders, Raymond Otlowski, Esquire, and Todd Conner, Esquire, were assigned to Taylor's case soon after his arrest. Otlowski was reassigned, and replaced by assistant public defender Kathryn van Amerongen, Esquire. Conner and van Amerongen stayed on through Taylor's direct appeal.

The defense quickly learned the depravity of the offense and the gravity of their client's predicament. They knew Taylor was guilty, and his confession note was authentic and voluntary. Moreover, Taylor knew Williams was pregnant when he killed her. Although Taylor also knew that the pregnancy was not his, Taylor would not say he killed Williams out of jealousy nor that he was provoked. This was despite his lawyers' repeated attempts to tease out an extreme emotional distress

defense.[3]

Although it was not revealed at trial, the defense further learned that after strangling her, the reason Taylor cut Williams's body was to make certain she was dead. Also, the defense team was confronted with Taylor's persistent efforts to "concoct" an actual innocense defense by framing someone. Taylor's "position from the very get-go" was that he would rather receive the death penalty than a life sentence, and he "never wavered from it." As discussed below, Taylor's preference for death over life in prison is an important, yet largely overlooked, fact.

In April 2000, trial counsel appointed Melvin Slawik, ACSW, LC, NCGC, NAFC, MAC, a psycho-forensic evaluator, to lead Taylor's mitigation evidence investigation. Slawik, a formally trained and qualified, long-time social worker, had experience with capital murder cases. Slawik selected Alvin L. Turner, Ph.D., an experienced psychologist, and Dr. James M. Walsh, a pastoral counselor with training in psychology, to evaluate Taylor. Dr. Walsh's selection was Slawik's canny response to Taylor's religious upbringing, also referred to by Dr. Turner as Taylor's "religiosity," and by Conner as "spirituality." A second psycho-forensic evaluator, Belle Nye, was assigned to help Slawik, but Nye was replaced by Kim Bryant, MSW, on March 6, 2001.

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[3] *See id.* at 1054-57.

Bryant's advent is noteworthy. Slawik wanted complete records from the start, and "Team Taylor," as they called themselves, "had some difficulty [getting records], especially with the children's departments."[4] Taylor was thirty-two, which meant some of his records were over twenty years old. Bryant had little experience or knowledge of capital murder defense strategy, but she had worked in the juvenile justice system. Using her "amazing" knowledge of the system and inside contacts, Bryant obtained some previously unobtainable files.

Taylor now criticizes the team's efforts in marshaling his records as too little and too late. It is far from established, however, that other investigators would have obtained the records sooner. To the contrary, but for Bryant, it is likely some records she obtained would still be unavailable. If another team might have done better, which is unlikely, the record shows it was at least a sound decision to employ Slawik, Nye, and Bryant to obtain Taylor's records, and that the team's efforts were reasonable. And, it has not been proved that Taylor would have fared better had the records materialized sooner.

To the extent that trial counsel did not provide records to the doctors before they did their evaluations, as Taylor now emphasizes, that was due more to the records' not being available and less to trial counsel's having been derelict. By the

[4]Evidentiary Hr'g Tr., Test. of Melvin Slawik, 106:20-23 (Dec. 6, 2006).

same token, if, despite the original experts' denials, an evaluation suffered meaningfully because some records were unavailable, trial counsel cannot be faulted. Finally, while some experts testified that they would have preferred to have had the then-unavailable records, they largely stand by their pretrial opinions. For example, the psychiatrist still believes that Taylor is dangerous and incorrigible.

C. Taylor's Pretrial Evaluations

1. Alvin L. Turner, Ph.D.

In June 2000, Dr. Turner interviewed Taylor for three hours, conducting a 120 question mental status examination. Dr. Turner did not write a formal report, characterizing his work as an "initial evaluation." Dr. Turner had little background information. He testified, however, "When I'm doing an initial evaluation, a lot of information is probably not something that is needed. . . . And it can create difficulties. . . ."

Taylor discussed his family with Dr. Turner, explaining how he had run away because his stepfather allegedly beat him with various objects, including "extension cords, shoes, [turkey] drumsticks, etc."[5] Taylor also talked about his education, including how he was sent to Ferris School, a reformatory, and his being

[5]Def.'s App. at A-313.

imprisoned several times.[6] Taylor further discussed his enrolling and failing in Job Corps.[7] Taylor often got into fights and drank heavily. Despite his having told others he had "Hennessy" before murdering Williams, Taylor told Dr. Turner he stopped drinking in 1987 because of an alleged "bad experience." Taylor told others, variously, that the bad experience was blacking out or being knocked out. Taylor also said he had children with three different women.[8] Dr. Turner noted Taylor "loses impulse control" and "loses memory."[9] Even Taylor's new experts, discussed below, acknowledge inconsistencies in Taylor's versions of events.

Dr. Turner was not tasked by trial counsel to perform a specific evaluation or specific tests, but Dr. Turner is an "established" mental health professional. He did what he believed was appropriate for an initial evaluation. Dr. Turner considered several possible diagnoses, including borderline personality disorder and intermittent explosive disorder. Dr. Turner testified that Taylor's behavior is characteristic of antisocial personality disorder. Dr. Turner resists making that "diagnosis of last resort," but he has not offered a better alternative diagnosis.

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[6] *Id.* at A-312, A-313.

[7] *Id.* at A-314.

[8] *Id.*

[9] *Id.* at A-315.

Based on his initial evaluation, Dr. Turner did not see a basis for a mental illness defense, including extreme emotional distress.

2. James M. Walsh, Ph.D.

Dr. Walsh, then a doctoral candidate with a masters,[10] evaluated Taylor in August 2000, meeting with him in prison four times. While not a psychologist, Dr. Walsh is trained, qualified and licensed to perform diagnostic assessments, and to offer opinions about his assessments to a reasonable degree of psychological probability. In his words, Dr. Walsh was "asked to perform a more full spectrum psychosocial assessment with the purpose of being able to tell [Taylor's] life story in sentence mitigation if the case got to that point."

Dr. Walsh administered the Addiction Severity Index, and diagnosed Taylor with antisocial personality disorder, cannabis dependence, cocaine abuse, and parent-child relational problem.[11] In his "psychosocial report," Dr. Walsh detailed Taylor's background since birth.

Taylor recalled his childhood memories "fondly," until he turned ten. At about that time, Taylor wanted expensive sneakers and his mother told him that if he wanted them, he would have to get the money. So, Taylor started selling

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[10]Dr. Walsh received his Ph.D. in June 2001.

[11]Def.'s App. at A-324.

marijuana. He started drinking. His life became chaotic. Behavior and performance problems appeared in school. Taylor's mother became "very cold and distant." Taylor's stepfather allegedly beat him with "belts, electrical wire, drumsticks, and shoes."[12] Within a year or two, when Taylor was eleven or twelve, he started doing burglaries. Dr. Walsh testified that Taylor told him the "very severe physical abuse," as Dr. Walsh characterized it, was between the age range of ten to thirteen. Dr. Walsh believes that Taylor's delinquent behavior came first, then school problems, followed by the parents' discipline. In other words, Dr. Walsh did not see Taylor's juvenile delinquency as having been caused by child abuse.

Taylor changed schools frequently, and ran away for approximately six months at age twelve. When Taylor returned home, "he was sent to the Bellefont School, a home for abused children." At that time he saw a child psychologist.[13] Again, it bears mention that Taylor's story about running away has not been well-established. While the full record broadly supports Taylor's story about running away and living on the street, it also suggests that much of Taylor's running away may have actually been staying out all night and coming home after his mother had left for work. There is reason to believe that, again, Taylor exaggerated and skewed

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[12] *Id.* at A-320.

[13] *Id.*

his story to his advantage.

When Taylor was in eighth grade, he was arrested and sent to Ferris School. After release, he attended Concord High School, but was sent back to Ferris "after he set a female student's hair on fire because of a racial slur."[14] When he was eighteen, he was released from Ferris and entered Job Corps. He was discharged eighteen months later, allegedly for fighting.

At age nineteen, Taylor was arrested for burglary and spent three years in prison. When Taylor was released, he started selling drugs, again. He was arrested the following year on drug charges.[15] After serving time at Plummer House, a work-release facility, he was arrested and convicted of robbery, resulting in a long prison sentence.[16] Shortly after release, he was arrested again for violating probation. When released, he again violated probation, and was soon arrested for Williams's murder.[17]

Dr. Walsh also noted Taylor's medical and substance abuse history. Taylor "drank regularly and heavily from age ten until he was 18[,]" but stopped

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at A-321.

drinking because of an alleged "alcohol-induced blackout."[18] Taylor has regularly used marijuana since age ten, and used cocaine occasionally since age sixteen. Taylor said that he used heroin and PCP "once or twice." Taylor also gambled occasionally.[19] Taylor mentioned his three children, including one with Williams.[20]

Taylor and Dr. Walsh also discussed Taylor's religious beliefs, which led Dr. Walsh to conclude that they did not play any direct role in the actions that he was convicted of committing. Dr. Walsh did, however, see remorse in Taylor's confession.

Taylor briefly described the night of Williams's murder. As Dr. Walsh reported:

> [Taylor's] description of the final month leading up to Theresa's death and his arrest is vague. He recalls that on the night Theresa died he was with her and having a nice evening. He states that Regina [Devlin, a paramour,] called and wanted to speak to him in private. He states that he went to meet with Regina and that Theresa, who was still jealous of Regina, followed him. He states that he stayed out late and then came back home to Theresa. She may have been with another man, but not sexually. He recalls leaving her then and ending up with Regina in a motel on Route 13. Sometime after that he was arrested. When asked how Theresa died he only shakes his head and

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[18] *Id.*

[19] *Id.*

[20] *Id.* at A-322, A-323.

says, 'I don't know.'[21]

As to Taylor at the time of their meetings, Dr. Walsh wrote:

> [Taylor] was cooperative. His mood was normal. His affect was flat. His speech was spontaneous and relevant. He showed no signs of motor agitation or retardation throughout our interviews. There was no evidence of any sensory or perceptual disorder. He was alert, oriented, and had a good memory except for the events leading up to his recent arrest. Intelligence appeared to be average. He reports considerable impulsivity throughout his lifetime. His emotional and intellectual insights were poor. As he was often vague and suspicious it was difficult to determine if he was reporting information reliably.[22]

Dr. Walsh met with Taylor's parents on November 2, 2000. He was the only mental health expert connected with this case who actually saw and spoke with them. Dr. Walsh wrote:

> [Taylor's] parents were able to substantiate much of [Taylor's] narrative with the notable exception of his relationship history with women, his 'double life' at age 10, and his history of cannabis dependence. . . . They deny any history of physical abuse of [Taylor] and state that he was sent away to Bellefont School because of his truancy and the frequency of his running away to live on the streets. . . . They state that they are dumbfounded as to [Taylor's] behavior throughout his lifetime. . . . [Taylor's] parents expressed considerable shame and embarrassment over his arrest for this murder, and are confused and unsure

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[21] *Id.* at A-323.

[22] *Id.* at A-323, A-324.

as to his guilt or innocense.[23]

Dr. Walsh did not have Taylor's confession or his records when he evaluated Taylor, and he testified that he sees Taylor's being on drugs, his asking for God's forgiveness and the mild brain damage as potential mitigators he did not explore because he was not told about them by trial counsel. But, before Taylor's sentencing, Dr. Walsh received "numerous" DFS records, including records from Ferris. Dr. Walsh testified that the records reinforced the antisocial personality diagnosis, as the records evidenced conduct disorder, which is antisocial personality disorder's juvenile precursor.

In hindsight, Dr. Walsh can see a need for neuropsychological testing, and he says he would have called for it had he known what Dr. Turner had been told by Taylor about memory loss and head injuries. Dr. Walsh testified that hearing this information "makes me want to go back and assess." But, Dr. Walsh did not see a need for neuropsychological testing based on his own assessment, and he did not call for any. Dr. Walsh, however, was not shown the results of the neuropsychological testing done for the postconviction relief proceeding.

Taylor was emphatic about his lawyers' not placing before the jury his allegations of childhood abuse. Nonetheless, a running theme now is that the alleged

[23] *Id.* at A-325, A-326.

abuse should somehow have been exploited by trial counsel. Dr. Walsh now implies that if he had the records and other information, he "would have tried to prevail upon him." But, even in hindsight, Dr. Walsh does not claim that he could have convinced Taylor to allow evidence of abuse. And, it does not appear that Dr. Walsh factored in Taylor's expressed preference for death over life imprisonment.

More importantly, all of the defense experts question Taylor's truthfulness, yet they seem to uncritically accept his dramatic accusations. Dr. Walsh, however, testified about a report by Ray Leonard, a Division of Family Services case worker, who investigated the worst allegation of abuse: Taylor's claim that his stepfather lashed him with an electrical cord. Leonard saw two small marks on Taylor's thighs. Dr. Walsh called the marks "cutting" and "mutilation." At the time, however, the case worker heard both sides, directly. He listened to Taylor and "confronted" Taylor's parents. "Both parents were appalled and denied any knowledge of the marks." They suggested the marks were made during "fights with neighborhood kids." The case worker, an independent, contemporaneous investigator, concluded:

> Someone in the family is not telling the truth about the way [Taylor] is punished. This worker suspects the truth lies somewhere in between [Taylor's] story and what his parents have to say.

All of the defense experts take Taylor's word over his parents'. This, despite the fact that the parents are seemingly upstanding people and Taylor's history of dishonesty goes back more than twenty years, and despite evidence that Taylor, at least, was exaggerating. The experts dismiss the parents' denials as typical for child abusers, and Taylor's objection to exploiting the abuse as a typical reaction from an abused child. At least one expert sees Taylor's denial of abuse as proof of it. The court has seen abuse victims covering for their abusers and, therefore, it appreciates the experts' view. The court also recognizes, however, that not everyone accused of child abuse is guilty.

If Taylor had reversed himself and allowed trial counsel to present mitigation based, directly or indirectly, on childhood abuse, the State could have easily challenged Taylor's credibility and, in the process, further emphasized Taylor's felonious background and lack of contrition. Moreover, trying to prove abuse would have pressured Taylor to testify, which would have been disastrous. In short, Taylor's elaborate construct built on his largely unsubstantiated, self-serving, childhood abuse claims is unrealistic and misguided at several levels. It does not come close to forming the powerful, unassailable mitigator that Taylor envisions.

3. Carol A. Tavani, M.D.

On March 7, 2001, the defense retained Dr. Tavani, an experienced

psychiatrist, to evaluate Taylor. As Dr. Tavani perceived it:

> [Taylor's] attorneys were interested in discerning if [Taylor] has a psychiatric diagnosis, and if so, how that might be related to the crime, and then whether there were any mitigating circumstances or diagnoses that might be useful in the preparation of his defense.[24]

After meeting with Taylor and reviewing Dr. Walsh's report, Dr. Tavani also diagnosed Taylor with antisocial personality disorder, as well as multiple substance abuse. In the postconviction evidentiary hearing, Dr. Tavani revealed:

> [I]n junior high [Taylor] said there were many, many assaults, . . . that he started fighting and picking on people, sometimes for money. He said especially when he drank, which he was doing a fair amount of, he had a very bad temper. . . . He told me . . . he set a girl's hair on fire because she called him a racial epithet. He beat a dog to death with a bat. He would set small animals on fire and enjoyed that. Animal cruelty, as you know, is a serious predictor of violence. . . . There were many, many burglaries.[25]

As to the evening before the murder, Dr. Tavani stated: "What he said to me was . . . he had coke, weed, beer, and alcohol when out the night before. This would be his minimum amount in a day."[26] Furthermore, Taylor "had six or seven

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[24]Evidentiary Hr'g Tr., Test. of Carol A. Tavani, M.D., 56:11-16 (Mar. 2, 2007).

[25]*Id.* at 41:3-23, 42:1-6.

[26]*Id.* at 11:15-18.

girlfriends at the time[]" of the murder.[27]

The psychiatrist explained that Taylor's antisocial personality disorder was "quite severe,"[28] that "this was a pretty clear diagnosis of antisocial personality disorder[,]"[29] and:

> [T]he clinical interview was so replete with antisocial traits, I don't think there was much of a question as to that diagnosis. In terms of additional diagnoses, as to whether [Taylor] had ADHD, . . . even without [the records], I'm very certain of this diagnosis [of antisocial personality disorder]. I would have been very certain of it then.[30]

Dr. Tavani opined about Taylor's competence to waive a mitigation defense:

> I would say that [Taylor] does have an ability to make [the] decision [to waive mitigating evidence]. I don't think the fact of the antisocial personality disorder diminishes his capacity to make that decision because he's of at least average intelligence. . . . He's not psychotic. He's not in any way out of touch with reality. And he understands the consequences. . . . I don't see any factors that would disenable him to weigh his options and make a rational decision, though you or I might not agree with it, but that's immaterial.[31]

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[27] *Id.* at 52:12-13.

[28] *Id.* at 104:7-10.

[29] *Id.* at 65:9-10.

[30] *Id.* at 39:20-23, 40:1-5.

[31] *Id.* at 105:13-23, 106:1-10.

Counsel had a teleconference with Dr. Tavani. Van Amerongen testified that the conversation was so "remarkable," she would remember it "if we are talking about this case in another ten years. . . ."[32] Van Amerongen "never, ever" heard Dr. Tavani "use such strong terms" before. Dr. Tavani told Taylor's trial counsel that Taylor was antisocial and "he should never see the light of day, and [Dr. Tavani could not] say anything in this case that would possibly help [the defense]. He should never get out of jail."[33] Counsel did not ask Dr. Tavani to write a report.

The defense examined Dr. Tavani closely at the postconviction relief hearing. She denied saying that Taylor "should never see the light of day[.]" She told the court that her words were:

> [T]his individual does have a marked propensity toward violence and dangerousness, and there is no reason to think that . . . is not going to happen again, that the overwhelming probability is that aggressive, violent behavior would be repeated, and that there was dangerousness.[34]

While less colorful than van Amerongen's version, Dr. Tavani's words are worse for Taylor as they imply that he is dangerous even in prison. Regardless of her exact

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[32]Evidentiary Hr'g Tr., Test. of Kathryn van Amerongen, Esquire, 93:19-21 (Mar. 1, 2007).

[33]*Id.* at 93:18-23, 94:1-4.

[34]Evidentiary Hr'g Tr., Test. of Carol A. Tavani, M.D., 88:9-15 (Mar. 2, 2007).

words, the lawyers accurately understood that the psychiatrist, whom they had retained to help the defense, opined that Taylor was aggressively and dangerously prone to violence, and the psychiatrist could not offer a psychiatric defense or anything helpful in mitigation. Even in hindsight, the psychiatrist does not agree that trial counsel somehow undermined her opinions.

4. Taylor's Parents

Trial counsel also met with Taylor's mother and stepfather several times. On top of Taylor's actual guilt, his confession, his long criminal history, severe antisocial personality, long-standing poly-substance abuse, sadism, bullying, womanizing, opposition to a mitigation case, and the difficulty in obtaining complete records, the defense had to deal with Taylor's family.

Instead of helping the defense put together a better mitigation case, Taylor's own mother disagreed with much of what the defense wanted to present. Taylor's mother was "cold" and unsympathetic. She was concerned Taylor's behavior reflected poorly on her otherwise upstanding family.[35] She had little good to say about her son. The mother and stepfather largely viewed Taylor as an unruly child who needed discipline, which does not prove they beat him repeatedly with wires, and so on. Taylor has said that the discipline was "based on the Biblical

[35]Evidentiary Hr'g Tr., Test. of Melvin Slawik, 179:19-23 (Dec. 7, 2006).

proverb that '[h]e who spares his rod hates his son, but he who loves him takes care to chastise him.'"[36] In the end, Taylor's mother and an aunt chose to testify briefly. That was the terrain upon which the defense team was operating as it prepared for trial.

D. Taylor's Waiver of Mitigation

Taylor was indicted for murder first degree and related crimes.[37] Taylor's motion to suppress his confession was denied on March 20, 2001.[38] Trial was held from March 27 to March 30, 2001, and Taylor was found guilty.

Before opening statements on the first day of the penalty hearing, defense counsel informed the court:

> Taylor has consistently maintained that if it came down to the decision between life imprisonment . . . or the imposition of the death sentence, . . . the latter decision would be more preferable to [Taylor]. He has maintained, I think, his position consistently basically from the very beginning of this case almost from the first time I met him back in March 2000 with respect to the mitigation evidence, your Honor. Mr. Taylor was presented with the defendant's . . . proposed mitigation factor list. . . . He reviewed each factor. He does not wish to go forward on those mitigating circumstances.

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[36]Def.'s App. at A-320.

[37]11 *Del. C.* § 636(a)(1).

[38]*State v. Taylor*, 2001 WL 282813 (Del. Super. Mar. 20, 2001) (Silverman, J.).

The court spoke with Taylor about the decision Taylor had made:

THE COURT: You understand, do you not, that you have the right, and no one can take it away from you against your will, to present to this jury mitigating evidence?

TAYLOR: Yes, sir.

. . . .

THE COURT: Do you further understand that if no mitigation evidence is presented by the defense on your behalf, it is almost a sure thing that the jury will find that the aggravating circumstances outweigh the mitigating circumstances, and in that way, it will recommend that you receive a sentence of death? Do you understand that?

TAYLOR: Yes.

THE COURT: Do you further understand that if you do not present mitigating evidence, regardless of what the jury recommends, most likely it will recommend death, but regardless of what the jury recommends, when it is my turn to weigh the aggravating circumstances against mitigating circumstances, and I have no real mitigating circumstances to put on the scale on that side, then the scale will come down in favor of the death penalty. Do you understand that?

TAYLOR: Yes.

THE COURT: Do you further understand that if the Court sentences you to death under these circumstances, it is going to be almost a sure thing that you will be executed?

TAYLOR: Yes.

THE COURT: Do you understand that if the defense does not present mitigating evidence, and if the sentence comes down as death, you will not have an opportunity to come back later and say that you have changed your mind?

TAYLOR: Yes.

THE COURT: Now, the defense has presented this notebook that they call 'defendant's proposed mitigating factors.' . . . Have you had an opportunity to review that notebook? . . .

TAYLOR: Yes.

THE COURT: And did you read the defendant's proposed mitigating factors . . . ?

TAYLOR: Yeah.

THE COURT: And you understand that you're in the process now of giving up the opportunity to have that evidence presented to the jury?

TAYLOR: Yes.

After this, the court facilitated Taylor's meeting with several family members in a jury room to reconsider the decision he had made. Then, Taylor had the rest of the day, the evening, the night and the early morning to reflect. One of the new experts, Dr. Dougherty, would agree with Taylor's counsel's suggestion that if Taylor had to focus on whether to present mitigation, "the last thing you wanted to do was bring his mother and stepfather into the room."

In fact, Taylor had months to focus on whether to present mitigation, and he was consistently opposed to it. Unbeknownst to the court, as part of their mitigation efforts, trial counsel had also enlisted a monk who worked in the correctional system, David Schlatter, O.F.M., to meet with Taylor. Brother David met with Taylor four to six times. But, Taylor decided that he did not want Brother David to testify. According to Brother David, it was because Taylor did not want to put his family through it.

Only after meeting with his family, at the court's urging, and reconsidering overnight, did Taylor, for the first time, change his position on mitigation. On the second day of the penalty hearing, trial counsel announced that Taylor had changed his mind, in part, and would allow evidence on some mitigating circumstances, including his history of substance abuse and addiction, his remorse for causing the death, that his execution would cause a significant loss to loved ones, and

that a life sentence would prevent him from returning to society and permit him to fully reflect upon the offense.

Consistent with his original, long-held position, Taylor did not want trial counsel to present evidence of physical or emotional abuse, or evidence that Taylor continues to be emotionally affected from family estrangement and suffers from a personality disorder. As presented at the outset above, the court specifically warned Taylor that he was tying his lawyers' hands, and that would work against him here. Taylor acknowledged that he was "willing to accept what might be the very extreme consequences" of his decision to forego mitigation evidence.

Thus, Taylor did not make his final decision under pressure. Taylor made his decision about mitigation at the outset. What only happened at the last moment was the court gave Taylor a final chance to change his mind, which he took, in part. After the court had further discussion with trial counsel about Taylor's competence, the penalty hearing defense began.

Trial counsel briefly called two witnesses during the penalty hearing: Taylor's mother and Taylor's aunt. They testified, in summary, that they love Taylor and will miss him when he is gone. They also offered a few humanizing touches. The State did not cross-examine either witness. Taylor's insistence on limiting his mitigation case, even after being told it would hurt him here, limited his trial

counsel's options. Taylor did not offer allocution.

The jury found, by a vote of 10 to 2, that the aggravating circumstances outweighed the mitigating circumstances. After issuing written findings, the court sentenced Taylor to death on July 6, 2001.[39] On appeal, the Supreme Court of Delaware affirmed Taylor's conviction and sentence.[40] The United States Supreme Court denied Taylor's petition for a writ of certiorari.[41] Taylor then began this proceeding by filing a petition for postconviction relief and an amended motion for postconviction relief. As discussed below, the court held a fourteen day hearing and received evidence by deposition.

E. Postconviction Proceeding

The court held a postconviction evidentiary hearing, lasting roughly fourteen days over the course of December 2006 to March 2007. Taylor's trial counsel were questioned for days. Many other witnesses testified, including: Jesse Hambright, a Department of Correction guard who had regular contact with Taylor from 2000 to 2001; Judith Mellen, former executive director of the ACLU, who investigated overcrowding and harsh punishments at Ferris School in 1989 (Taylor

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[39] *See State v. Taylor*, 2001 WL 1456688 (Del. Super. July 5, 2001) (Silverman, J.).

[40] *Taylor v. State*, 822 A.2d 1052 (Del. 2003) .

[41] *Taylor v. Delaware*, 540 U.S. 931 (2003).

was in Ferris until 1986); Robert Golebiewski, a presentence officer who testified at Taylor's penalty hearing; John Scholato, Jr., Taylor's teacher at Ferris School and Gander Hill Prison; David Ruhnke, Esquire, who has tried fourteen capital cases in Maryland and who testifies, reviewed Taylor's file and wrote a report regarding his opinions; Regina Devlin, mentioned in the confession and introduced above; Brother David; and Drs. Edward Dougherty and Jonathan H. Mack, postconviction psychologists. More testimony was taken by deposition post-hearing.

Taylor also attempted to call his mother as a witness. Although Taylor's mother testified at the penalty hearing, she resisted process, adamantly refusing to cooperate or testify on her son's behalf at the postconviction hearing. The court denied Taylor's request for an arrest warrant.

On September 30, 2009, Taylor filed his opening brief in support of his motion. The State filed an answering brief on February 1, 2010. Taylor replied on March 16, 2010.

1. Edward Dougherty, Ed.D.

Dr. Dougherty's Doctor of Education is in psychological foundations. He has done post-doctoral training, and is a licensed psychologist in Australia and New Jersey. He has testified in Delaware and throughout the nation. Besides his work as a professional expert, he consults with about thirteen police departments on

officers' fitness for duty. And, he runs a school for emotionally disturbed teens, funded by New Jersey, where he is based. But, mostly now his work is in forensics.

Dr. Dougherty testified that under the guidelines for forensic psychologists in capital cases, the total time spent on a case "should be 40 to 50 hours. It could be as high as 60." Dr. Dougherty saw Taylor for, at most, a total of six to eight hours, in November 2004 and June 2005. During the six to eight hours he spent with Taylor, he interviewed him and administered seven psychological tests.

Dr. Dougherty concluded, in part, "Taylor suffers from the disorders of Antisocial Personality, Attention Deficit/Hyperactivity Disorder and Borderline Personality Disorder[.]"[42] Dr. Dougherty opined:

> Taylor demonstrates many characteristics of Borderline Personality Disorder (BPD). The essential features of BPD are a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity by early adulthood. . . . Taylor's Borderline Personality Disorder is in part due to his abuse by his parents[.] . . . [Taylor's] refusal to allow his attorney after meeting family members to mount a defense based on his physical and emotional abuse is [c]haracteristics [sic] of a person who has been abused. Physically abused children view their abuse as deserved and therefore protect the abuser[.] . . . Taylor met with his family before deciding to restrict his attorney from presenting possible mitigating factors of early childhood abuse[.] . . . Taylor's ability to knowingly and intelligently waive his right to put forth

[42]Def.'s App. at A-133, A-154.

> mitigating factors of physical and emotional abuse was impaired and eventually influenced of [sic] his abusers.
>
> Mr. Taylor's mental health disorders greatly affected his ability to function and to think clearly at the time of the incident that led to the death of Theresa Williams. . . . He was under extreme emotional distress at the time in question.
>
> . . . .
>
> [Antisocial Personality Disorder, ADHD, and BPD] interfere with his ability to think clearly and resist impulses when in a stressful situation such as when he felt his girlfriend, Theresa Williams was cheating on him and would abandon him. He expressed remorse for his actions.[43]

Dr. Dougherty's testimony adds little that is helpful here. He agrees that Taylor's primary diagnosis is antisocial personality disorder. Although his further diagnoses of ADHD and borderline personality disorder may help explain the way Taylor's mind works, ADHD and BPD do not account for the murder, for Taylor's preference for death over life in prison, or for his backing off of his total opposition to a mitigation case.

The court sees Dr. Dougherty as a partisan. Despite his endorsing the need for corroboration, Dr. Dougherty accepted Taylor's stories uncritically, ignoring or dismissing contrary evidence. As to some matters, such as extreme emotional distress, he confused his hypothesis with the facts. His reasoning was circular and

[43] *Id.* at A-153, A-154.

his testimony was result-driven.

Dr. Dougherty testified emphatically that a "standard of practice" and training for forensic psychologists is that "you must corroborate everything whenever possible anything that you are presented in a case either by the client, or by the discovery materials." Yet, he formed his opinion about Taylor's inability to waive mitigation without reviewing the transcript of the waiver. It is not established that he even discussed the waiver with Taylor.

Taylor did not, in fact, meet with his family before deciding to waive mitigation, as Dr. Dougherty thought. Nor did the court force Taylor to decide on the spot whether he would change his decision, as Dr. Dougherty assumed. As presented above, Taylor did not want mitigation, preferring death over life in prison, and he did not want to embarrass his family. Taylor made his decision long before the court spoke with him. The court was encouraging Taylor to change his decision, which he did in a limited way.

Dr. Dougherty was accurate when he concluded that Taylor was not functioning properly or thinking clearly when he murdered Williams, but Taylor has always denied that he did it out of jealousy. Moreover, it is uncontested that Taylor was seeing other women; he knew Williams was seeing other men; and he knew about the pregnancy before the day of the murder. No one told Dr. Dougherty that the

murder was provoked by Williams's revealing her infidelity to Taylor, as Dr. Dougherty concluded.

Thus, even if Dr. Dougherty knows better than Taylor what Taylor was thinking while Taylor was under the influence of cocaine, marijuana and alcohol, and even if Taylor's voluntary intoxication was not a contributing cause, as Dr. Dougherty unpersuasively opined, Taylor's conduct still does not make out a claim of extreme emotional distress under Delaware law.

2. Jonathan H. Mack, Psy.D.

Dr. Mack, a qualified neuropsychologist, performed a battery of neuropsychological tests on Taylor over two full days in June 2006. Based on the neuropsychological testing, Dr. Mack diagnosed Taylor with:

> Cognitive Disorder, Not Otherwise Specified; Personality Change Due to Brain Damage, Combined with Labile, Disinhibited Aggressive and Paranoid features; Alcohol Dependence in institutional remission; Cannabis Dependence by history; and Phencyclidine Abuse by history.

Dr. Mack also opined that "the neuropsychological testing does support Dr. Dougherty's impression of an Attention Deficit Hyperactivity Disorder, Not Otherwise Specified."[44]

[44] *Id.* at A-131.

Dr. Mack specifically found evidence of "mild" brain damage:

> Neuropsychological testing does confirm the presence of brain damage/dysfunction. The brain damage/dysfunction is best characterized as mild. Neurocognitive abilities affected by this brain damage include working memory, non-verbal auditory attention, multitasking, immediate and delayed non-verbal memory, incidental immediate and delayed visual memory, copying ability with constructional dyspraxia on the Aphasia Screening Test, and impaired manual dexterity on the right side in comparison to the left side, impaired tactile-kinesthetic problem solving with the right and left hands on the Tactual Performance Test and significant impairment of concept formation on the Category Test with evidence of impaired mental flexibility on the Stroop Color and Word Test. The above findings are best described as reflective of diffuse, non-focal static brain damage/dysfunction of a chronic nature.
>
> . . . .
>
> Given the fact that neuropsychological testing confirms the presence of underlying brain damage in Mr. Taylor, in combination with his history of paranoid thinking and persecutory ideas, emotional lability, and disinhibited aggression, Mr. Taylor meets the criteria for Personality Change due to Medical Conditions/brain damage[.][45]

The court has no reason to question the opinion of Dr. Mack that was solidly based on objective testing. Basically, that means the court accepts Dr. Mack's opinion that Taylor has mild brain damage, perhaps from birth. The open question concerns the implications of Dr. Mack's objective findings.

Much of Dr. Mack's specific testimony about the mild brain damage

[45] *Id.* at A-130.

described problems with memory, language, manual dexterity and concept formation. It is unclear, however, the extent to which the mild brain damage accounts for Taylor's antisocial personality. And, it is even less clear the extent, if any, that the brain damage helps account for Taylor's murdering Williams, or anything relating to this case.

Dr. Mack's opinions that are based on things that Taylor said are unreliable. Dr. Mack based his diagnoses, in part, on Taylor's mostly self-reported history of head injuries.[46] Taylor told Dr. Mack that "he was hit on the head numerous times in the past."[47] Taylor's medical records indicate two hospital emergency room visits for head injuries. First, Taylor was taken by ambulance to St. Francis Hospital on December 22, 1991. The emergency room record states: "assaulted just prior to arrival – hit on top of head. . . . 1 – 1 ½ [inch] lac[eration] to top of head."[48] Taylor received stitches and was released.[49] On March 18, 1994, Taylor visited St. Francis Hospital's emergency room a second time after he got a "tooth punched out."[50] The cut on his head in 1991and the lost tooth in 1994

[46] *Id.* at A-112.

[47] *Id.*

[48] *Id.* at A-200, A-201.

[49] *Id.* at A-202.

[50] *Id.* at A-206.

produce the only documented instances of head trauma. No one, much less a physician, testified that those injuries were serious enough to cause personality change.

As to the night of the murder, Dr. Mack's report states:

> Taylor said that Ms. Williams was arguing with him as to why he did not come in because she took off from work. He said they went upstairs and they argued some more. He said that he recalls cleaning his sneakers. Mr. Taylor said that he and Ms. Williams were fighting and that, 'The next thing I knew she was on the ground.' . . . Mr. Taylor went on to say, 'I had something in my hand and I choked her with it. . . .' [Dr. Mack] inquired as to whether he strangled her. Mr. Taylor said, 'I did. I think it was my shoe strings. . . .' [Dr. Mack] asked him if he was aware of what he was doing at the time. Mr. Taylor said, 'I didn't think I was hurting her for real. I didn't think I put that much force on her.['] . . . Taylor denied intent to kill Ms. Williams.
>
> . . . .
>
> Taylor said that there were some signs that Ms. Williams had another man in the house at that time. He said, 'Who'd you have up in here?' Mr. Taylor said that they argued a lot about that. He said that normally he would just turn around and leave. He said, however, at the time, 'I was high as a mother on coke, weed and alcohol. Earlier I bought a fifth of Hennessy, but I didn't drink it all. I gave some people some and three blunts of pot and a pack of cocaine cigarettes.'[51]

Dr. Mack coupled Taylor's description with his testing and concluded:

[51] *Id.* at A-111, A-112.

> At the time of the homicide of Theresa Williams, . . . Taylor was under extreme emotional duress [sic] due to his instantaneous belief that Ms. Williams was cheating on him in conjunction with her accusations towards him. It is further my opinion . . . that Mr. Taylor's ability to conform his behavior to the requirements of the law, as well as to fully formulate the intent to commit murder, were significantly compromised by his above diagnosed diseases of the mind and brain, in conjunction with his extreme emotional arousal at the time, and his self-reported intoxication.[52]

II. Taylor's Claims

In summary, Taylor makes nine claims. Three of them directly allege ineffective assistance of counsel for: failing to investigate defenses and mitigators, failing to object to non-statutory aggravators, and failing to prepare mental health defenses.[53] Four of the remaining claims relate to matters that were or should have been raised before now. To avoid Rule 61's procedural bars, Taylor alleges that by failing to make those claims when timely, trial or appellate counsel was ineffective. Thus, the court must review those claims under *Strickland v. Washington*.[54] Taylor's final claims, which challenge Delaware's death penalty statute and method of execution, seem intended for review elsewhere.

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[52] *Id.* at A-131.

[53] *See* infra II.A, B and D.

[54] 466 U.S. 668 (1984).

A. Failure to Investigate Mitigators

First, Taylor contends that "trial counsel provided ineffective assistance of counsel in the investigation and presentation of the penalty phase." Taylor claims that "[c]onsistent with the Sixth Amendment, effective representation involves the independent duty to investigate and prepare. . . . Trial counsel performs deficiently by not providing readily available mitigating evidence to the jury at the penalty phase because he prejudices a defendant from receiving an individualized sentence."

Taylor asserts that "[t]he ABA Guidelines are 'guides to determining' the adequacy *vel non* of capital counsel's investigation."[55] "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[56] Taylor refers to the 1989 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.4.1, which states:

> Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin

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[55] *See Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (holding that the ABA standards are "standards to which we long have referred as 'guides to determining what is reasonable[]'"); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Strickland*, 466 U.S. at 688-89, 709.

[56] *Wiggins*, 539 U.S. at 525 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.4.1(C) (1989)).

> immediately upon counsel's entry into the case and be pursued expeditiously. . . . The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.

Furthermore:

> *Counsel's duty to investigate is not negated by the expressed desires of a client.* Nor may counsel 'sit idly by, thinking that the investigation would be futile.' The attorney *must* first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess.[57]

Thus, Taylor concludes that "capital counsel have an 'obligation to conduct a thorough investigation of the defendant's background' for mitigating evidence, and anything less than a 'thorough investigation' constitutes deficient performance."[58] Taylor also concludes that "[c]ounsel should explore, *inter alia*, 'medical history,' 'family and social history,' 'education history,' 'special education

[57]ABA Guideline 11.4.1, commentary (emphasis added); *see also Outten v. Kearney*, 464 F.3d 401, 418 (3d Cir. 2006).

[58]*See Williams*, 529 U.S. at 364, 396 ("Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."); *see also Rompilla v. Beard*, 545 U.S. 374 (2005).

needs,' 'employment and training history,' 'prior adult and juvenile records,' and 'prior correctional experience.'"[59]

The State responds that Taylor "treats the [ABA] Guidelines as if they were mandates, providing a checklist for courts to use in assessing counsel's effectiveness." Relying on the recent United States Supreme Court case, *Bobby v. Van Hook*,[60] the State contends that "the ABA Guidelines are not 'inexorable commands with which all capital defense counsel must fully comply'; rather, the Guidelines should be considered only as guides to what reasonableness means rather than its definition."[61] Furthermore, "[t]he ABA Guidelines, then, represent an ideal to which counsel may aspire; they do not, however, serve as a codification of the minimum constitutional standards of professional competence that *Strickland* establishes."

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[59]*See* ABA Guideline 11.4.1(D)(2)(C) (1989); *Outten*, 464 F.3d at 417-18.

[60]--- U.S. ----, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009).

[61]*See id.* at 16-17.

Van Hook,[62] *Schriro v. Landrigan*,[63] and *Taylor v. Horn*[64] are instructive.

Van Hook explains:

> *Strickland* stressed . . . that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition. We have since regarded them as such. What we have said of state requirements is *a fortiori* true of standards set by private organizations: '[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'[65]

The Court also found that *Van Hook* was "a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.'"[66]

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[62]--- U.S. ----, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009).

[63]550 U.S. 465, 477 (2007) (holding that, because the lower court reasonably determined that defendant "instructed his attorney not to bring any mitigation to the attention of the [sentencing] court, . . . [t]he District Court was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, [defendant] would have . . . refused to allow his counsel to present any such evidence[]").

[64]504 F.3d 416, 455-56 (3d Cir. 2007) ("[W]hatever counsel could have uncovered, Taylor would not have permitted any witnesses to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence.").

[65]*Van Hook*, 130 S.Ct. at 17 (citations omitted).

[66]*Id.* at 19.

Strickland holds that a defendant must show that trial counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[67] Counsel's performance is judged by that of "reasonably effective assistance."[68] Additionally, the defendant "must show that the deficient performance prejudiced the defense[,]" where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[69] Defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[70]

Here, the court rejects Taylor's legal overstatement that his trial lawyers' effectiveness is measured by the ABA standards. As the United States Supreme Court repeatedly emphasizes, and as presented above, the standards are only guidelines. They are not "inexorable commands."[71]

The point has not been missed by the Supreme Court of Delaware.

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[67] *Strickland*, 466 U.S. at 687.

[68] *Id.*

[69] *Id*.

[70] *Id.* at 694.

[71] *Van Hook*, 130 S.Ct. at 17.

Delaware respects the ABA Guidelines, but only as "guides" that are not "absolute."[72] Neither the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines is legally tantamount to ineffective assistance of counsel.

More importantly, as presented above, factually this is not a case where trial counsel sat idly by, "did not even take the first step," waited "roughly one year" to begin investigating,[73] or waited until the night before the penalty hearing.[74] This is also not a case where trial counsel investigated, but failed to perform

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[72]*See, e.g., State v. Riley*, 1988 WL 47076, at *4 (Del. Super. Apr. 29, 1988) (Bush, J.) (citing *Strickland*, 466 U.S. at 689) ("While the American Bar Association standards are not absolute, this Court takes note of them as guides to counsel's duty of reasonable investigation.").

[73]*See, e.g., Porter v. McCollum*, --- U.S. ----, 130 S.Ct. 447, 453, --- L.Ed.2d ---- (2009) ("[Counsel] did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family. . . . Here, counsel did not even take the first step of interviewing witnesses or requesting records."); *Marshall v. Cathel*, 428 F.3d 452, 466-67 (3d Cir. 2005) ("Marshall's trial did not begin for roughly one year after the indictment, and, all the while, no preparation pertaining exclusively to the penalty phase of trial was undertaken by [counsel] or his investigator[.]"); *Jermyn v. Horn*, 266 F.3d 257, 308 (3d Cir. 2001) ("[Counsel] confirmed . . . that he had no tactical reason for failing to investigate the allegations of childhood abuse, failing to obtain the Scotland School records, and failing to call Dr. Phillips and the Isralows as witnesses during the penalty phase.").

[74]*See, e.g., Bond v. Beard*, 539 F.3d 256, 288 (3d Cir. 2008) ("Trial counsel did not investigate possible mitigating circumstances or ask experts to do so. Instead, counsel conducted an *ad hoc* and perfunctory preparation for the penalty phase *the night before it began*."). *See generally Williams*, 529 U.S. at 395 ("[C]ounsel did not begin to prepare for that phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood . . . because they incorrectly thought that state law barred access to such records.").

constitutionally adequate investigation.[75]

Most importantly, even if the ABA Guidelines are adopted as the law of Delaware, which has not happened to date, the court is satisfied that Taylor's trial counsel actually met the guidelines. Taylor's trial counsel assembled an appropriate, properly-funded team and began their investigation almost immediately. Although their effort to obtain old school and government records took time and was less than perfect, the defense team persisted and achieved reasonable success.

Despite Taylor's adamant opposition to a mitigation case, trial counsel conducted an extensive mitigation investigation, employing at least two psycho-forensic evaluators and others for that purpose. Trial counsel sought the opinions of two doctors and a pastoral counselor, examined school and Division of Family Services records, and met with Taylor, his mother, his stepfather, and others.

With significant exaggeration, Taylor specifically asserts:

> There was absolutely no investigation or consultation with any expert in any of the following areas: (1) organic brain

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[75]*See, e.g., Sears v. Upton*, --- U.S. ----, --- S.Ct. ----, --- L.Ed.2d ----, 2010 WL 2571856, at *3 (2010) ("[T]he cursory nature of counsel's investigation into mitigation evidence – 'limited to one day or less, talking to witnesses selected by [Sears'] mother' – was 'on its face . . . constitutionally inadequate.'"); *Wiggins*, 539 U.S. at 524 ("Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989."); *Outten*, 464 F.3d at 415 ("Counsel conceded that their investigation was cursory, as it consisted simply of a letter to Outten asking him to provide 'the names of potential penalty phase witnesses.' Nothing else was done by way of investigation except for the conduct of limited discussions with Outten and his mother.").

> damage and psychiatric diagnoses of Personality Change due to Brain Damage, ADHD and Borderline Personality Disorder; (2) 'guilty but mentally ill' as a mitigator in the penalty phase; (3) Taylor's medical history, including head injuries; (4) Taylor's prior criminal record; (5) Taylor's religious beliefs; (6) Taylor's expressions of remorse for Williams' murder; (7) Taylor's adjustment to life in prison and conduct in prison prior to trial; (8) substance abuse history; and (9) intoxication at the time of the offense.[76]

As shown above and discussed below, except for Dr. Mack's recent diagnosis of personality change due to brain damage, trial counsel investigated all of the things listed by Taylor now. And, to the extent that trial counsel did not explore brain damage, that was only because the experts they retained did not see it.

With their competent experts' help and through consultation with their client, trial counsel considered and explored different potential avenues of action, including extreme emotional distress and guilty but mentally ill. Taylor's claims that those things were not considered is simply not true. As Conner testified, he was "sure that [trial counsel] hashed back and forth whether [they] would go in that direction."[77]

Unfortunately for them and for Taylor, trial counsel were stymied at every turn. Taylor's arguments to the contrary notwithstanding, the record shows that the original mental health professionals considered a wide range of possible

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[76]Op. Br. 27; *but see* supra I.B and C.

[77]Evidentiary Hr'g Tr., Test. of Todd Conner, Esquire, 12:20-22 (Dec. 15, 2006).

diagnoses that potentially would have helped at trial and in mitigation. With the exception of testing for organic brain damage, discussed above, none of the original experts was seriously concerned about the missing background information that Taylor now insists was vital.

As presented above, the primary diagnosis offered by the only psychiatrist who testified at the postconviction evidentiary hearing was "severe" antisocial personality disorder. She also noted substance abuse. All of the mental heath professionals agree about that.

Taylor told everyone that he was seriously abused as a child, but the psychiatrist testified that as to people with antisocial personality disorder, "[t]here is a marked tendency not to be truthful."[78] The pastoral counselor similarly opined that "it was difficult to determine if [Taylor] was reporting information reliably."[79] Against that background, there is reason to believe that one of the new defense team's core claims – unexplored childhood abuse – is also dramatically exaggerated.

No one, including Taylor, has ever testified firsthand that Taylor was abused. To the contrary, Taylor's parents, who are clergy, deny it.[80] Furthermore,

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[78]Evidentiary Hr'g Tr., Test. of Carol A. Tavani, M.D., 101:15-16 (Mar. 2, 2007).

[79]Def.'s App. at A-323, A-324.

[80]*Id.* at A-325.

Taylor told the doctors that he did not see what he accused his stepfather of as "abuse[.] . . . [H]e said that his father was trying to teach him right from wrong. He was trying to set him straight."[81] The social worker who actually investigated the worst claim of abuse did not substantiate it, much less the pattern of abuse on which Taylor now relies. Besides, Taylor insisted that trial counsel not present mitigators based on abuse.[82]

Similarly, as presented above, Taylor's claims of serious head trauma are largely uncorroborated by medical records. There are two incidents, neither of which is shown to have even caused loss of consciousness. Thus, it is far from clear that trial counsel could have carried off the one-sided presentation Taylor made at the postconviction relief hearing.

As also presented at the outset above, the psychiatrist further learned that Taylor enjoyed torturing and killing small animals with a bat or with fire. He set a schoolgirl's hair on fire. Had the psychiatrist been called at trial, on cross-examination she would have agreed that, based on her diagnosis, it could be said that Taylor "was born to be hanged." As set out above, Taylor's viciousness was shocking, even to an experienced psychiatrist. In any event, the psychiatrist told trial

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[81]Evidentiary Hr'g Tr., Test. of Carol A. Tavani, M.D., 35:23, 36:1-10 (Mar. 2, 2007).

[82]*See Landrigan*, 550 U.S. at 477.

counsel not to call her as a witness, and the court was not aware of those terrible things when it sentenced Taylor.

The court is satisfied that trial counsel's retaining Dr. Tavani helps establish trial counsel's effectiveness, and trial counsel cannot be blamed because the psychiatrist concluded that Taylor is a vicious criminal. Nor can trial counsel be held responsible because the other experts did not do better for Taylor.

Although they could not gin up an extreme emotional distress defense for Taylor like his new experts did, trial counsel seriously considered it and they testified emphatically that they tried hard to "tease" one out of Taylor. They also considered "guilty but mentally ill," addiction, and other potential avenues.

As another avenue, trial counsel turned to Taylor's family, but that, too, was largely a dead end. Then came Taylor, himself, and his unreasonable demands that the defense pursue a phony actual innocense defense, and no mitigation case. Even if trial counsel performed more investigation than they did, the evidence would not have fit within the confines provided by Taylor for presentable mitigation evidence.[83]

The court acknowledges the argument that if trial counsel had ferreted out more information, they might have changed Taylor's mind and he would have

[83] *See id.*; *Taylor v. Horn*, 504 F.3d at 455-56.

agreed to a broader mitigation case. Taylor, however, even now, has not claimed that if he knew then what his new defense team has come up with, he would have changed his attitude toward the mitigation case presented at the penalty hearing. The claim that trial counsel could have changed Taylor's mind is entirely theoretical.

There is a significant overtone to Taylor's failure to investigate claim. At bottom, Taylor is challenging his original experts' work. In many ways, all the experts agreed. But, Taylor is frustrated that the original experts did not perform neuropsychological tests. Through that testing, Dr. Mack came to the personality change due to mild brain damage diagnosis, which could be an alternative to antisocial personality disorder. That and, to a lesser extent, the testimony that criminals sometimes mellow over time, are fresh. It seems that Taylor is angling for a way to justify a new penalty hearing so that Drs. Dougherty and Mack can testify. But first, there are fundamental obstacles that Taylor must get around.

"There is no right to effective assistance of expert witnesses distinct from the right to effective assistance of counsel[,]"[84] and "a mental health investigation is not rendered inadequate 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'"[85] In *Poyner v.*

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[84]*Poyner v. Murray*, 964 F.2d 1404,1418 (4th Cir. 1992).

[85]*Peede v. State*, 955 So.2d 480, 495 (Fla. 2007).

Murray, Poyner argued that "the psychiatrists and psychologists who evaluated Poyner prior to the penalty phases of his trials failed to conduct psychological tests of the type necessary[.]"[86] *Poyner* holds:

> Poyner's complaint here seems aimed not at the performance of his counsel but rather at the performance of [the original experts]. The gravamen of this claim is that these psychiatrists were not experienced or imaginative enough . . . . However, this court in the past has made clear that there is no right to effective assistance of expert witnesses distinct from the right to effective assistance of counsel. A clear overtone to the argument is the proposition that if a defense attorney has not produced a witness who would agree with the after-the-fact diagnosis presently presented, then the attorney is ineffective. We reject this proposition as we did its corollary in *Waye v. Murray*, 884 F.2d 765 (4th Cir. 1989). . . . The mere fact that his counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance.[87]

Peede v. State[88] similarly holds:

> Although it is true that [the original expert] did not have available to him Peede's records or other background

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[86]*Poyner*, 964 F.2d at 1417.

[87]*Id.* at 1418-19 (citing *Roach v. Martin*, 757 F.2d 1463, 1477 (4th Cir. 1985)). *See also Pruett v. Thompson*, 771 F. Supp. 1428, 1441 (E.D. Vir. 1991), *aff'd*, 996 F.2d 1560 (4th Cir. 1993) ("A criminal defendant has no constitutional . . . right to a psychiatrist of his own choosing, or to 'shop around' at state expense for experts who will present the most advantageous opinions possible.").

[88]955 So.2d 480 (Fla. 2007).

> information the evidentiary hearing experts had at their disposal, [the original expert] arrived at conclusions similar to the current experts' findings. . . . We have consistently held that a mental health investigation is not rendered inadequate 'merely because the defendant has now secured the testimony of a more favorable mental health expert.' Obviously, defense counsel sought [the original expert]'s appointment because of [the expert]'s reputation. However, there is no guarantee in such a situation that the expert will develop only favorable opinions. In essence, [the original expert]'s evaluation produced a 'mixed bag' of favorable and unfavorable opinions, but that is always the risk.[89]

Accordingly, while it may be argued that Drs. Turner, Walsh, and Tavani could possibly have performed more or different tests, or that trial counsel could have retained different doctors, the mere fact that Taylor's counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance." Trial counsel's hires were objectively reasonable, and trial counsel were not required to find "the best" psychologists and psychiatrists available. Even if counsel had retained "the best" experts, there is no guarantee that the experts would have developed favorable opinions of Taylor.[90] That is so, even taking Dr. Mack's testing into account.

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[89] *Id.* at 495 (citations omitted).

[90] *See* Evidentiary Hr'g Tr., Test. of Kathryn van Amerongen, Esquire, 93:18-23, 94:1-4 (Mar. 1, 2007).

Another obstacle, mentioned repeatedly, is Taylor's original and apparently continuing opposition to testimony about his childhood and mental condition. Taylor offers no assurance that he would agree to the new experts testifying for him in a jury trial.

Finally, as to Drs. Dougherty and Mack, not only are they partisans, but their opinions are somewhat at cross-purposes. Dr. Mack's brain damage opinion strongly suggests that Taylor's problems started at birth. While that makes it harder to blame Taylor for what he became, it seems to undermine the idea that Taylor will age out of his antisocial behavior. In any event, Taylor's second round of experts offer only a little more than the originals. Mostly, if Drs. Dougherty and Mack were allowed by Taylor to testify to a jury, they would better explain how Taylor became so dangerous. They would not, however, blunt the terrible truth that after a life of crime, Taylor got high and strangled a defenseless, pregnant woman in her home while her children, including one by Taylor, played outside.

The court finds that although trial counsel's investigation was not legally required to meet the American Bar Association's standards, it met them anyway. And, even if the investigation did not measure up to the ABA's standards, it met the Constitution's requirements, established in *Strickland* and its progeny.

B. Failure to Object to Non-Statutory Aggravating Factors

Second, Taylor contends that "[t]rial counsel's deficient performance with respect to rebutting the State's case at the penalty phase, alone and in combination with their other deficient performance, prejudiced the defense." Taylor asserts that "[t]here is a reasonable probability that, with reasonable investigation, presentation and objection to duplicative and unreliable evidence, that the defense could have ameliorated the aggravating side of the scale and the jury's weighing of the factors for and against death would have come out the other way."

Specifically, Taylor claims that his "entire criminal history was attached to the three presentence reports that were admitted by the State in the penalty phase[,]" and that "[t]he jury learned of arrests for which the State entered a nolle prosequi, or that were withdrawn or dismissed by the court." Taylor contends that trial counsel failed to object to the admission of the arrest records and that "trial counsel never requested police reports and never reviewed court files."

Taylor also claims that trial counsel failed to object when the presentence officer testified that Taylor's prognosis had been "poor," and that "[t]rial counsel never requested to review Taylor's presentence file." Furthermore, Taylor asserts that, during the penalty phase, the State argued that due to Taylor's status as a habitual offender, "an assault of the victim would require a life sentence; therefore,

her murder requires a death sentence." Taylor argues that this was "duplicative and inflammatory." This appears to be a *Strickland* claim in the sense that Taylor alleges that trial counsel's failure to object to the evidence of unadjudicated charges, dropped charges, and the like, was professionally deficient, and but for the failure, combined with other alleged mistakes, Taylor would not have been sentenced to death.

Trial counsel's failure to object as alleged neither deprived Taylor of counsel guaranteed by the Sixth Amendment, nor prejudiced Taylor. In *People v. Lego*,[91] the defendant objected when prosecutors presented non-statutory aggravating factors, including unadjudicated criminal charges, in the penalty phase.[92] *Lego* held: "[D]efendant [was] not prejudiced where, at a . . . sentencing hearing, the jury hears as evidence of nonstatutory aggravating factors a summary of defendant's past criminal conduct."[93] As long as the evidence is relevant and reliable, "evidence pertaining to a defendant's prior misconduct is admissible although the misconduct may not have resulted in prosecution or conviction."[94] Trial courts have wide

[91] 507 N.E.2d 800 (Ill. 1987).

[92] *Id.* at 808.

[93] *Id.*

[94] *Id.* at 809; *see also People v. Davis*, 793 N.E.2d 552, 563 (Ill. 2002) ("Defendant does not attempt to argue that the circuit court erred by admitting and considering evidence of uncharged criminal conduct. To do so would have been futile in any event."); *Peterson v. Murray*, 904 F.2d 882, 886 (4th Cir. 1990) ("[T]he Virginia Supreme Court has held that 'evidence relating to juvenile offenses and unadjudicated criminal activity' is admissible because

discretion to determine relevancy.[95] In the penalty phase, "all possible relevant information about the individual defendant" and his "probable future conduct" should be considered.[96] Relevant information presented in the penalty phase need not be admissible in the guilt phase.[97] Prior juvenile adjudications and unadjudicated adult and juvenile criminal charges are "highly relevant . . . because they provide[] the jury with the most complete information possible regarding defendant's life and characteristics."[98] Thus, Family Court convictions and unadjudicated adult and juvenile criminal charges were proper non-statutory aggravators. Because Taylor's potential for future dangerousness is relevant,[99] Defendant's "poor" prognosis was also a proper non-statutory aggravator.

Even if it were improper to consider this evidence, which it was not, the error was harmless. Given Taylor's serious prior convictions and other proven

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'a trier of fact called upon to decide whether or not to impose the death sentence is entitled to know as much relevant information about the defendant as possible.'").

[95]*State v. Dressner*, 2010 WL 2723706, at *8 (La. Supr. July 6, 2010).

[96]*Jurek v. Texas*, 428 U.S. 262, 275-76 (1976).

[97]*United States v. Jones*, 132 F.3d 232, 241 (5th Cir. 1998), *aff'd*, *Jones v. United States*, 527 U.S. 373 (1999).

[98]*Lego*, 507 N.E.2d at 809; *see also People v. Flores*, 606 N.E.2d 1078, 1094 (Ill. 1992) ("[C]ertainly, prior uncharged criminal conduct is relevant in a sentencing determination.").

[99]*Peterson*, 904 F.2d at 885.

statutory aggravators, excluding Taylor's Family Court adjudications, his "poor" prognosis and unadjudicated adult and juvenile charges would not have prevented a lopsided death recommendation.

In *People v. Davis*,[100] the defendant, relying on *Apprendi v. New Jersey*,[101] argued that his sentence could not be increased based on prior unadjudicated charges.[102] *Davis* held that because other statutory aggravators had been found, considering unadjudicated charges, even when the defendant had no prior criminal convictions, was harmless because it could not have increased his maximum sentence.[103] Like Davis, Taylor has proven statutory aggravators working against him. Thus, considering Taylor's unadjudicated adult and juvenile arrests was harmless.

The State presented substantial statutory aggravators, far outweighing the mitigators.[104] The court is confident that references to Taylor's complete arrest record and "poor" prognosis do not account for the jury's recommendation, and they

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[100]793 N.E.2d 552 (Ill. 2002).

[101]530 U.S. 466 (2000).

[102]*Davis*, 793 N.E.2d at 565.

[103]*Id.* at 565-66.

[104]*Taylor*, 2001 WL 1456688, at *1.

absolutely do not explain the sentence imposed by the court. Thus, Taylor's second claim fails both *Strickland* prongs.

C. Waiver Was Not Knowing, Intelligent and Voluntary

Third, Taylor claims that "[b]ecause of trial counsel's lack of investigation and preparation for the penalty phase, Taylor was not given the opportunity to knowingly and intelligently make the decision to present substantial mitigating evidence which was available but not investigated." Taylor contends, in circular fashion, that "[t]here was no discussion with Taylor about presenting the mitigation evidence that was never investigated [or] . . . about additional mitigation evidence which was discovered but for which counsel was unprepared to present." Accordingly, Taylor claims, "[t]here can be no effective waiver of a fundamental constitutional right unless there is an 'intentional relinquishment or abandonment of a known right or privilege.'"[105]

Furthermore, Taylor claims that he "was unaware that his subsequent 'waiver' was meaningless. Moreover, by failing to address the conflict of interest between Taylor and trial counsel, trial counsel ineffectively represented Taylor at the penalty phase." Taylor contends that the waiver itself was invalid because "evidence

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[105] *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Deaton v. Dugger*, 635 So. 2d 4, 8 (Fla. 1993); *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002).

relating to emotional and physical abuse during childhood was already admitted by the State (without defense objection) via the PSI reports and prison records[.]" Taylor claims that "the PSI report included the very information which Taylor advised counsel and the Court the day before that he did not wish to present." Taylor claims that, despite the State's admission of this evidence, "trial counsel felt their 'hands were tied' by Taylor's wishes." He argues that "[t]here is specific evidence in the record demonstrating that trial counsel's interests were conflicted and compromised; therefore, prejudice is presumed." Relying on a state trial court's interpretation of the federal Constitution from 1986, Taylor also asserts that his waiver was invalid because the Eighth Amendment "mandates are endangered when a capital defendant, as here, declares an intention to partially 'waive mitigation[.]'"[106]

Besides begging the question in several ways, for instance, assuming little investigation, assuming childhood abuse, assuming childhood abuse was a viable mitigator, and so on, Taylor's waiver argument conflates alleged ineffective assistance of counsel with alleged errors by the court. As to the latter, Taylor was obligated to challenge his waiver's efficacy on direct appeal. In other words, to the extent that Taylor contends that a capital murder defendant cannot waive mitigation

[106] *See State v. Hightower*, 518 A.2d 482, 483 (N.J. Super. 1986) (holding that defense counsel could present mitigation evidence during sentencing phase despite defendant's express order not to contest imposition of death sentence).

as a matter of law, that claim could have been raised in Taylor's appeal. It is, therefore, procedurally barred under Superior Court Criminal Rule 61(i)(3), and, although it is couched as a Constitutional claim, Taylor has not shown what he must in order to render Rule 61's bars inapplicable.

As an ineffective assistance of counsel claim, Taylor's waiver argument mostly is a repackaged version of his first claim for relief, based on failure to investigate. The gist of the argument seems to be that if trial counsel had done a better investigation, they would have had a better mitigation case and they would have been more effective in convincing Taylor not to waive mitigation.

First, the United States Supreme Court "has never held that an 'informed and knowing' requirement exists with respect to the decision to not introduce mitigating evidence."[107] Even assuming there were such a requirement, as discussed above, trial counsel adequately investigated and prepared for the penalty phase, and Taylor's waiver was informed and knowing.

It appears that Taylor has abandoned his latest experts' opinions that, due to his mental condition, his waiver was "irrational." In any event, the court accepts Dr. Tavani's contrary opinion. As mentioned, at the postconviction relief hearing, Dr. Tavani opined that there was no clinical reason why someone like Taylor

[107] *Landrigan*, 550 U.S. at 466.

could not voluntarily waive a mitigation case, as Taylor did. That was consistent with what the court was told before it made its findings during the penalty hearing. Taylor had the mental capacity to make a knowing, voluntary and intelligent waiver.

Furthermore, there was no legally cognizable "conflict of interest" between Taylor's trial counsel and Taylor. Trial counsel and Taylor merely had a difference of opinion over what course was in Taylor's best interest as to sentencing. Trial counsel had no personal interest in the sentence. Trial counsel did their best to bring Taylor to their point of view. When that largely failed, they did what they could at the penalty hearing. Their duty to Taylor did not extend to obtaining an outcome that he did not want, nor did it include the duty to proceed on sentencing in a way that he believed was not on his behalf.

As presented above, the court conducted a thorough colloquy with Taylor about his waiver. Taylor agreed that he had reviewed the proposed mitigating factors, understood that he was giving up the opportunity to have that evidence presented to the jury, and understood the finality of his decision and its potentially "fatal" consequences.

Taylor's waiver argument sits on a fault line running through his entire position here. Besides treating assumptions as facts, Taylor repeatedly emphasizes small parts and ignores the whole. In this instance, Taylor insisted that he preferred

death over life in prison, and he was adamant about not exposing him and his family to a penalty hearing and scrutiny about his psyche and childhood. It appears that is still Taylor's personal position. Even taking the postconviction relief hearing into consideration, there is still no reason to believe that were he given a new hearing, Taylor would agree to a full-blown, no-holds-barred mitigation case, nor would he testify or allocute.

D. Failure to Prepare Mental Health Defenses

Fourth, although the initial defense team retained two doctors, a pastoral counselor, and two psycho-forensic investigators, Taylor contends, again with exaggeration, that "trial counsel was constitutionally ineffective at the guilt phase and penalty phase . . . by failing to investigate, prepare and present evidence supporting mental health defenses." Taylor asserts that "[t]rial counsel's failure to adequately investigate an extreme emotional distress claim prejudiced Taylor."

Taylor specifically claims that "[t]rial counsel [] had never spoken to Dr. Turner and had consulted no expert regarding a possible extreme emotional distress defense. No psychological or neuropsychological expert asked Taylor about the events on the date of the murder." Taylor asserts that if trial counsel conducted a reasonable investigation,"counsel would have consulted with psychiatric experts, forwarded Taylor's records, and presented extreme emotional distress as a defense in

the guilt phase, or at a minimum, as a mitigator in the penalty phase."[108] The two postconviction experts, Drs. Mack and Dougherty, "opined that Taylor, as a result of psychiatric illness and organic brain damage, was acting under extreme emotional distress at the time of Williams' murder."

Essentially, this argument again boils down to trial counsel's alleged failure to investigate. As presented in detail above, however, most of Taylor's allegations are flatly untrue. Again, trial counsel immediately employed an experienced, masters-level, licensed, social worker to coordinate Taylor's psycho-forensic evaluation. They retained three mental health experts in different disciplines. An experienced psychologist did an initial evaluation shortly after Taylor's arrest. A less-experienced, but qualified, psychological assessor performed formal testing not long after the initial evaluation. Finally, close to trial, a psychiatrist reviewed the test results and further examined Taylor. All the experts spoke with Taylor about the murder and they all had extreme emotional distress, as well as other defenses and mitigators, in mind.

Trial counsel examined Taylor's Ferris School and Division of Family Services records. Based on the information they gathered, after serious consideration and repeated attempts to establish it, trial counsel made the reasonable decision not

[108] *See generally* 11 *Del. C.* § 641.

to pursue an extreme emotional distress defense that was unsupported by their client and the hard evidence.

Furthermore, the extreme emotional distress defense now envisioned by Taylor's new counsel and his new experts is another argument that sits on the defense's fault line. The hypothetical extreme emotional distress defense turns on Taylor's personal background, including its family dynamics. Taylor still appears to be opposed to that evidence's use. So, while it is true that counsel could, technically, attempt to present that defense over Taylor's objection, the idea is impractical, at best. In any event, as explained above, the whole theory is far-fetched.

Having presided over the trial and postconviction relief hearing, the court rejects the argument that competent counsel should have raised extreme emotional distress on behalf of a client who told them what Taylor said about the murder, including his spotty memory of it, not being jealous and his being highly intoxicated by his voluntary use of drugs and alcohol. That is so, even if counsel found experts like Drs. Dougherty and Mack to make the claim.

As presented above, Taylor repeatedly told trial counsel that before he went to Williams's home, he had been drinking and using drugs, and he knew Williams was pregnant by another man, but he was not jealous about that. Moreover, there was no claim of a jealous flare-up during the final meeting. Taylor barely

remembered the actual murder. By the same token, there is no evidence, whatsoever, that Williams said or did anything that provoked Taylor, much less was there evidence of a causal relationship between any provocation and the murder.

The fanciful nature of Taylor's extreme emotional distress argument is, perhaps, best reflected by the fact that Taylor, himself, still does not claim extreme emotional distress. No one, including the postconviction relief experts, has explained how counsel could make a convincing extreme emotional distress case without Taylor's cooperation. In reaching that conclusion, the court is aware that Taylor's new experts see Taylor's inability to recall and testify about how he murdered Williams as proof that he was provoked and under extreme emotional distress. But, again, even if there were an explanation, trial counsel cannot be faulted now for not raising the defense, and there was no prejudice to Taylor because trial counsel considered but did not try that tack. No reasonable juror would have accepted the extreme emotional distress claim presented at the postconviction relief hearing.

E. Court's Consideration of Evidence Not Presented to Jury

Fifth, Taylor argues that "[t]rial counsel never objected [to the trial court's consideration of evidence not presented to the jury] nor did they raise the issue on appeal. Mr. Taylor's rights under the Sixth, Eighth and Fourteenth

Amendments and Article I, Sections 4, 7, and 11 of the Delaware Constitution were violated."

Taylor further contends that "[t]he trial court reviewed and relied on information contained within the 'mitigation notebook' . . . that was admitted as a court exhibit, but which the jury never considered[,]" and that "Taylor had no opportunity to elucidate for the court aspects of the notebook which were mitigating or refute factual averments that constituted non-statutory aggravation."[109] Taylor asserts that "[t]he court did not just consider supposed 'mitigation,' but relied on aggravating evidence found in the binder[,]"[110] and that the trial court's "[r]eliance on the notebook violated the principles set forth in *Gardner v. Florida*[.]"[111]

Trial counsel's failure to contest the trial court's consideration of the mitigation notebook did not constitute ineffective assistance of counsel because it did not prejudice Taylor. In *Gardner v. Florida*, the trial judge ordered a presentence investigation of Gardner after the jury retired to deliberate. Several weeks after the trial and jury verdict, the presentence investigation was completed, and the trial judge subsequently sentenced Gardner to death. The trial judge's finding was based, in

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[109]*See Taylor*, 2001 WL 1456688, at *1.

[110]*See id.* at *4.

[111]430 U.S. 349 (1977).

part, on "his review of 'the factual information contained in said pre-sentence investigation.'"[112] All portions of the presentence investigation report were not disclosed to Gardner or his counsel and, accordingly, the United States Supreme Court concluded that Gardner was denied due process when the death sentence was imposed.[113]

This case differs significantly from *Gardner* because the mitigation notebook was created by Taylor's counsel and reviewed by Taylor before trial. Therefore, unlike in *Gardner*, where defendant and defense counsel never saw evidence the trial judge relied upon, Taylor's trial counsel actually put together the mitigation notebook with evidence they collected for the specific purpose of showing it to the court. Furthermore, here, the court used the mitigation notebook as an attempt to "cobble together a mitigation defense[.]"[114] Nevertheless, the court concluded that "even after considering the mitigating factors not presented to the jury, the mitigators are far outweighed by the aggravators."[115]

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[112] *Id.* at 353.

[113] *Id.* at 362.

[114] *Taylor*, 2001 WL 1456688, at *1 ("[Taylor] did not, however, allow his counsel to present the strongest mitigation case. Even so, the court has attempted to cobble together a mitigation defense from all available records, including a binder of materials proffered by Defendant's trial attorneys.").

[115] *Id.*

Defendant's argument about the mitigation notebook makes one point. The Findings After Penalty Hearing, in part, states:

> When he was fifteen, Defendant told one of the several psychologists and counselors who have interviewed him that his life's ambition was to become a lifeguard so that he could 'sit around and get paid and do nothing.' Defendant's lack of ambition was not an adolescent phase. His indifference is characteristic.[116]

That came from a report in the mitigation notebook.

Trial counsel is not faulted for including the report for the sake of completeness. The court's quoting that unfavorable comment, however, was inconsistent with the reason for the court's reading the notebook. The court was looking for favorable things about Taylor that might have undermined the 10 to 2 recommendation of death.

The court has carefully reconsidered its findings without taking the quoted language into account. As to Taylor's personal history, the facts remain that he has an atrocious criminal record, has done nothing productive, has low-average intelligence, has never held a steady job, has been involved with illegal drugs since childhood, and has fathered children but failed to support them in any way.

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[116] *Id.* at *4.

Ignoring the unfavorable comment in the mitigation notebook, therefore, does not change the outcome of the weighing process. The court held Taylor's indifference and indolence against him, which it still does. But, the court did not come to view Taylor as a non-productive member of society because he admitted it to a psychologist. While Taylor's candid comment caught the court's attention, the more important fact was Taylor's demonstrated indifference and indolence. In the final analysis, his comment about it was merely illustrative. It did not add significantly to the unfavorable assessment of Taylor's contributions to society.

F. Prosecution's Improper Closing Argument

Sixth, Taylor argues that the prosecution made an improper closing argument and that "[t]rial counsel was ineffective for failing to object to the improper argument and/or raise the issue on appeal." Taylor claims that "the prosecution improperly argued that Taylor's substance abuse was irrelevant and 'shouldn't serve as an excuse.'" That mis-characterizes the record.

In his penalty hearing closing, Taylor argued that much of his criminal record was associated with his substance abuse since childhood, implying that his bad criminal history was more to do with drugs than violence. In rebuttal, the State argued, in part: "The drug problem we recognize, . . . but it shouldn't serve as an excuse. . . . Doesn't serve as an excuse for what he did." The State then argued that

Taylor had opportunities for drug treatment, but he failed.[117] Neither side suggested that Taylor was under the influence at the time of the murder. Both sides argued Taylor's longstanding drug "problem."

In the penalty hearing's context, the State was trying to counter-argue that Taylor's drug problem was not a mitigator. The jury had to have realized that it was not being asked to "excuse" Taylor. The jury had to have been keenly aware that it was making a sentencing recommendation between life or death. Either way, Taylor was not going to be let off. Therefore, the jury had to have taken the argument to mean that Taylor's recognized drug problem should not work to Taylor's advantage as the jury weighed aggravators against mitigators. That was a reasonable answer to Taylor's argument.

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[117]The prosecution argued:

> [Taylor] had the opportunity to go to NET Counseling. You heard the probation officer talking about that program has been very successful in the Probation Department, they recommend that program quite frequently. Defendant was given that in 1999, fall of 1999. He missed five sessions, he did not complete it, violated, had an active capias out for his arrest at the time he committed this horrible and brutal crime against Treaty Williams.
> . . . .
> But he was given a chance. Again, the defendant was given another chance . . . he did not take advantage of those programs.

Trial Tr. 78:5-13, 79:19-23, 80:1-3 (Apr. 4, 2001).

Taylor also now contends that trial counsel should have objected to the State's penalty hearing argument:

> What does it matter, the fact that the letter that he wrote may have some indication that he was going to commit suicide? How is that relevant to your decision in weighing the aggravators versus the mitigators? It has no relevance here.

The State also argued in rebuttal: "One of the mitigators before you is the fact that the defendant was remorseful. The State asks you to question whether or not that remorse is truly sincere." Taylor contends that "[t]here is no requirement that mitigating evidence have an 'explanatory nexus' to the crime."[118]

The argument to which Taylor now objects again came in the State's rebuttal. Taylor argued that the confession was evidence of remorse as it was tantamount to a suicide note.[119] The rebuttal was to the effect that Taylor's thinking of committing suicide after the murder did not show remorse.[120] As with the State's poor choice of "excuse," its using "irrelevant" might have drawn an objection, or not. But again, in context, the arguments were not unfairly prejudicial.

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[118] *See Tennard v. Dretke*, 542 U.S. 274, 289 (2004); *Smith v. Texas*, 543 U.S. 37, 45 (2004).

[119] Trial Tr. 67:1-5 (Apr. 4, 2001).

[120] *Id.* at 78:14-22.

Taylor relies on the admonition in *Lesko v. Lehman*[121] that during the penalty hearing, "a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices."[122] In *Lesko,* the prosecutor set up a strawman to knock it down. Lesko testified during his penalty hearing, but only "about his childhood, family background, and schooling[,]" which "did not bear even a tangential relationship to the substance of the charges against him."[123] Lesko did not argue remorse as a mitigator. Nevertheless, the prosecutor commented on Lesko's failure to express remorse, stating that Lesko "didn't even have the common decency to say I'm sorry for what I did."[124] The Third Circuit held that "the prosecutor's criticism of Lesko's failure to express remorse penalized the assertion of his fifth amendment privilege against self-incrimination."[125]

Unlike *Lesko*, where remorse was not a mitigator, Taylor's trial counsel argued that remorse was "perhaps the most important" mitigating circumstance to be considered by the jury. Trial counsel argued Taylor's remorse based on the

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[121]925 F.2d 1527 (3d Cir. 1991); *see also Cabrera v. State*, 840 A.2d 1256, 1271 (Del. 2004) ("The Court adopted the test articulated in *Lesko v. Lehman* for determining whether a prosecutor improperly commented on a defendant's right to remain silent.").

[122]*Lesko*, 925 F.2d at 1541.

[123]*Id.* at 1543.

[124]*Id.* at 1541.

[125]*Id.* at 1545 (citing *Griffin v. California*, 380 U.S. 609 (1965)).

confession letter, which was in evidence. The State appropriately relied on other evidence to rebut Taylor's arguing remorse. For example, after the murder, Taylor "went to a motel with his girlfriend."[126]

In hindsight, the court does not fault Taylor's counsel for arguing remorse. But, having argued remorse, there were no reason to keep the State from arguing lack of remorse, based on evidence in the record. The State handled the potential Fifth Amendment problem in this case smartly. The jury's sentencing recommendation did not turn on a couple of solecisms in the State's rebuttal.

G. Trial Court's Anti-Sympathy Instruction

Seventh, Taylor claims that he is entitled to a new sentencing hearing because "[t]rial counsel was ineffective for failing to object to" the trial court's anti-sympathy jury instruction.[127] Taylor contends that "[t]he penalty phase jury

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[126] *Taylor*, 2001 WL 1456688, at *2.

[127] The court stated:

> You are reminded that you must base your answers to the questions on the special interrogatory sheet solely upon the evidence and the instructions as to the law and you must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.
>
> While evidence about the victim and about the impact of the murder on the victim's and defendant's families is relevant to your decision, you must remember not to allow sympathy to influence your sentence recommendation in any way. The Court does not charge you not to sympathize with the victim or family or defendant or his family,

instructions in this case specifically informed the jury not to 'be swayed' by 'mere . . . sympathy' that would arise out of some of the mitigating evidence present in the case."

Seeming to equate sympathy with mercy, Taylor argues here that "a capital sentencing jury must be able to give effect to feelings of mercy to the defendant arising out of the evidence in the case." Taylor further asserts that "[t]his failure prejudiced the outcome of the penalty phase; had the jury considered mercy in its analysis of the penalty phase evidence, it is reasonably likely the outcome of the penalty hearing would have been different." Taylor also argues that "[d]irect appeal counsel was ineffective for failing to raise this meritorious claim on appeal."

Taylor has not shown that objections to the anti-sympathy instruction were common in April 2001. More importantly, the United States Supreme Court and this court have held that similar instructions do not violate the Constitution.[128] "In guiding the jury's sentencing deliberations and recommendation in the penalty phase

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> because it is only natural and human to sympathize. But the Court does charge you not to allow sympathy to influence your sentencing recommendations.

Trial Tr. 89:6-21 (Apr. 4, 2001).

[128] *See, e.g., California v. Brown*, 479 U.S. 538, 542 (1987) ("The jury was told not to be swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.' . . . [T]he instruction . . . does not violate the provisions of the Eighth and Fourteenth Amendments to the United States Constitution."); *State v. Norcross*, 2010 WL 1493120, at *10 (Del. Super. Apr. 8, 2010) (Babiarz, J.).

of a capital case, the Court is compelled to give an instruction that precludes the consideration of sentiment, conjecture, sympathy, passion, prejudice, or public feeling as both irrelevant and improper."[129]

Telling the jury not to let sympathy influence the recommendation should have helped protect Taylor's right to a fair recommendation. While a verdict based on mercy would have helped Taylor, a verdict based on sympathy probably would have favored the State, as Williams and her family were more deserving of sympathy than were Taylor and his family. The anti-sympathy instruction, as given, was required because it was right, and vice versa. Accordingly, Taylor's claim fails to pass either of the *Strickland* prongs.

H. Delaware's Method of Execution is Cruel and Unusual Punishment

Eighth, Taylor contends that "Delaware's method of execution constitutes cruel and unusual punishment in violation of the State and Federal Constitutions. The parties agreed to a stay . . . of this issue pending *Jackson v. Taylor*."

[129] *State v. Steckel*, 708 A.2d 994, 1001 (Del. Super. 1996); *see also State v. Ferguson*, 1995 WL 413269, at *7 (Del. Super. Apr. 7, 1995) (Gebelein, J.).

The Third Circuit decided *Jackson v. Danberg*[130] in February 2010, holding that "under *Baze* [*v. Rees*[131]], an execution protocol that does not present a substantial risk of serious harm passes constitutional muster and that . . . Delaware's protocol presents no such risk."[132] Accordingly, the Third Circuit "dissolve[d] the District Court's stay."[133] Taylor has preserved the issue.

I. Delaware's Death Penalty Statute is Unconstitutional

Ninth, Taylor contends that "[p]rior counsel was ineffective at trial and on appeal for failing to raise the constitutionality of [the death penalty] statute, facially and as applied in Taylor's case, as well as the violation of Taylor's statutory right to a sentence that is not arbitrary, capricious, or disproportionate." He argues that "[b]ecause there is a reasonable probability of a different outcome at trial and on appeal had counsel raised the constitutional and statutory aspects of this claim, Taylor was prejudiced by counsel's failure to do so."

Specifically, Taylor asserts that "[t]he death penalty is unconstitutional facially and as applied, because the statutory scheme fails to genuinely narrow the

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[130]594 F.3d 210 (3d Cir. 2010).

[131]553 U.S. 35 (2008).

[132]*Jackson*, 594 F.3d at 212.

[133]*Id.*

class of persons eligible for the death penalty in violation of due process and the Eight Amendment." Taylor claims that "[t]he statutory aggravating factors are [] numerous, broadly drafted, and expansively interpreted" and that "[t]he Delaware death penalty statute is also unconstitutionally vague." Taylor contends that "[t]he statute's treatment of mitigating factors is so vague that the importance of mitigation is entirely discounted."

Taylor's trial counsel were not ineffective for failing to raise this issue. Eleven *Del. C.* § 4209 provides the procedure for determining punishment for first degree murder. Section 4209(e) lists aggravating circumstances, including that "[t]he defendant was previously convicted of . . . a felony involving the use of, or threat of, force or violence upon another person[,]"[134] and "[t]he victim was pregnant."[135] As to the former, Taylor could not claim that he had not been convicted of violent felonies: robbery first degree and robbery second degree. Nor was there doubt that Taylor rightly stipulated at trial that the victim was pregnant. Therefore, as applied to Taylor, these factors are not overly vague or broad.

Furthermore, Delaware's courts have not found that the statute is unconstitutionally vague or broad, and the United States Supreme Court has

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[134] 11 *Del. C.* § 4209(e)(1)(i).

[135] 11 *Del. C.* § 4209(e)(1)(p).

emphasized that state legislatures have discretion to determine the class eligible for the death penalty.[136] "[A] State's capital sentencing scheme . . . must 'genuinely narrow the class of persons eligible for the death penalty.' . . . If the sentencer fairly could conclude that an aggravating circumstances applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."[137] Delaware's Supreme Court has reviewed 11 *Del. C.* § 4209(e)(1), concluding "that no one of those factors could be applied to every defendant convicted of first degree murder in Delaware."[138] Accordingly, trial counsel's failure to make this argument did not constitute ineffective assistance of counsel.

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[136]*See, e.g., Kennedy v. Louisiana*, --- U.S. ----, 128 S.Ct. 2641, 2661, 171 L.Ed.2d 525 (2008) ("The Court has said that a State may carry out its obligation to ensure individualized sentencing in capital murder cases by adopting sentencing processes that rely upon the jury to exercise wide discretion so long as there are narrowing factors that have some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'").

[137]*Arave v. Creech*, 507 U.S. 463, 474 (1993).

[138]*Steckel v. State*, 711 A.2d 5, 13 (Del. 1998) (noting that "Delaware has approximately the same number of statutory aggravating circumstances as other states.").

III.

For the foregoing reasons, Defendant's Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (criminal)
Timothy J. Donovan, Jr., Esquire
Jennifer-Kate Aaronson, Esquire
Milton Taylor, Defendant